on the first loan, he would later be able to negotiate a new loan with the appellant. The evidence on this point is nebulous and vague. There was some discussion between the debtor and the appellant's managing director a week prior to the arrangement of the 27th May about a further loan of $5,000 but nothing was apparently said about the period of the loan or of the terms of repayment. There may have been some vague expectation in the mind of the debtor that he might get some further financial assistance by way of loan from the appellant, but it seems unlikely that it ever took concrete shape and, certainly, not to the extent when it could be said to have exercised a significant influence on the mind of the debtor when he made the arrangement with the appellant on the 27th May.

It follows, therefore, in our view, that the only substantial motive actuating the debtor on the 27th May was that he wished to repay an old friend in full as soon as funds became available in the bank to meet the post-dated cheque for $4,000 and that he wished to make this payment notwithstanding that he was unable at that time to meet his numerous trade debts as they fell due. This being so, the dominant motive of the debtor in our judgment was a desire to prefer this particular creditor and, therefore, this payment constituted a fraudulent preference.

For these reasons this appeal must be dismissed with costs.

Appeal dismissed.

Solicitors: *Allen & Gledhill.*

Re S. SYED AHMAD & CO.; Ex parte THE OFFICIAL ASSIGNEE

[O. Bk. J. (Whyatt C.J.) June 20, 1958]

[Singapore — In Bankruptcy No. 24 of 1958]

Bankruptcy — Goods seized under Writ of Seizure and Sale — Possession by Sheriff for 23 days — Payment out — Act of Bankruptcy — Notice.

In the Colony a debtor commits an act of bankruptcy the moment execution against him has been levied by seizure of his property under process in an action or in any civil proceeding in the High Court or District Court where the judgment including costs is for an amount exceeding $500. Seizure alone constitutes an act of bankruptcy. A voluntary payment made by the debtor to release property seized in execution would not entitle the creditor to retain the benefit of the execution under section 48 of the Bankruptcy Ordinance if a receiving order is made against the debtor within 12 months from the date thereof. In such a case the Official Assignee is entitled to require the execution creditor to refund moneys paid to him by the debtor to avoid a sale by the Sheriff. Under the corresponding Act in England on the other hand, an act of bankruptcy is not complete until the goods have been either sold or held by the Sheriff for 21 days.

Cases referred to:—

(1) *Figg v. Moore Bros.*, (1894) 2 Q.B. 690.
(2) *Ex parte Villars*, L.R. 9 Ch.D. 432.
(3) *John Burns-Burns v. Brown*, (1895) 1 Q.B. 324.

BANKRUPTCY.

A. W. Ghows (Asst. Official Assignee) for the Official Assignee.

M. Karthigesu for the execution creditors.

Cur. Adv. Vult.

Whyatt C.J.: — This application by the Official Assignee raises an interesting point as to the right of the Official Assignee to require an execution creditor to refund moneys paid to him by the debtor to avoid a sale by the Sheriff within twelve months of the date of the adjudication.

The facts are simple and may be briefly summarised as follows. On the 29th November 1957, a creditor named Fielding, Brown & Finch (Far East) Ltd., having obtained judgment against S. Syed Ahamed & Co. for $5,751.88 and costs, issued execution against the firm by seizure of the debtor's property under a writ of seizure and sale. Four days later, on the 3rd December, the debtor paid to the Sheriff $5,096.71 in order to avoid a sale and obtained a release of the property, and the Sheriff, after holding these moneys for fourteen days as required by section 49 (2) of the Bankruptcy Ordinance, paid them over to the solicitors for the execution creditors on the 18th December. Shortly afterwards, on the 30th December, another judgment creditor levied execution against S. Syed Ahamed & Co. but this time there was no payment forthcoming to obtain the release of the debtor's goods. Consequently a bankruptcy petition was presented on the 11th January 1958 and a Receiving Order made against the firm on the 14th February; one of the partners was adjudicated bankrupt the same day and the remaining partners were adjudicated bankrupt on the 2nd May. On these facts, the Official Assignee claims to be entitled to recover the moneys paid to Fielding, Brown & Finch (Far East) Ltd. on the 18th December.

The argument presented to the Court by the Official Assignee, like the facts of this case, has the virtue of simplicity. He contends that under the doctrine of relation back, these moneys, as a matter of law, belonged to him and not the debtor when they were paid over to Fielding, Brown & Finch (Far East) Ltd. on the 18th December. The doctrine of relation back is set forth in subsection (1) of section 46 of the Bankruptcy Ordinance in the following words:

> "The bankruptcy of a debtor . . . . shall be deemed . . . . to have relation back to and commence at the time of the first of the acts of bankruptcy proved to have been committed by the bankrupt within twelve months next preceding the date of the adjudication".

The Official Assignee states that the execution levied by Fielding, Brown & Finch (Far East) Ltd. on the 29th November was the first of the acts of bankruptcy committed by debtor within twelve months next preceding the date of the adjudication, and therefore it follows that the bankruptcy of the debtor "shall be deemed to have relation back to and to commence" on the 29th November. Consequently the moneys paid by the debtor to the Sheriff on the 3rd December and subsequently handed over to Fielding, Brown & Finch (Far East) Ltd., on the 18th December belonged in law to the Official Assignee. The logic of this argument is clear and compelling.

The next question to be considered is whether there is any statutory exception to the somewhat harsh doctrine of relation back and if so, whether this payment to Fielding, Brown & Finch (Far East) Ltd. falls within it. There is a statutory exception and it is contained in section 53, the marginal note to which reads, encouragingly, "Protection of bona-fide transactions without notice." The section provides *inter alia* that a payment by a bankrupt to his creditors shall not be invalidated provided two conditions are complied with; first, the payment must be made before the date of the receiving order and secondly, the person to whom the payment is made must not, at the time of the payment, have notice of an available act of bankruptcy committed by the bankrupt before that time. Now in the present case, the payment was made before the date of the receiving order and the only matter in dispute is whether at the time of the payment, namely, the 3rd December, Fielding, Brown & Finch (Far East) Ltd., had notice of an available act of bankruptcy committed by the debtor before that date. The Official Assignee contends that the available act of bankruptcy committed before the 3rd December is the execution which was levied on the 29th November, and as Fielding, Brown & Finch (Far East) Ltd. were the very persons who issued that execution, clearly they must have known about it. Again the logic is clear and compelling.

In support of this logic, the Official Assignee referred to the case of *Figg v. Moore Bros.*[1]. That was a case which arose after an amendment had been made to the law of bankruptcy in the United Kingdom whereby it was provided that a debtor commits an act of bankruptcy if execution is levied against his goods and the goods are held by the sheriff for a period of twenty-one days. In the case in question the sheriff held the goods for twenty-three days before he was paid out. Subsequently the trustee in bankruptcy brought an action to recover these moneys from the execution creditors claiming that an act of bankruptcy had been committed at the expiry of twenty-one days, that is to say, two days before the execution was completed; he maintained that the execution creditors knew of the act of bankruptcy before the completion of the execution, since they had themselves levied the execution and consequently they could not be allowed to retain the moneys. It was argued in that case on behalf of the execution creditors that the title of an execution creditor is not avoided by notice of an act of bankruptcy occasioned by his own act but this argument was rejected by Vaughan Williams J who expressed himself thus: ".....at the time when the transaction was completed by the money being paid to the sheriff, the execution creditors had notice that two days previously the act of bankruptcy had been committed, because they cannot be heard to say that they did not know that the sheriff had been holding the goods for twenty-one days." So in the present case, when payment was made to the sheriff on the 3rd December, the execution creditors had notice that four days previously on the 29th November an act of bankruptcy had been committed by the seizure of the debtor's goods since they themselves had issued the execution against the debtor's property. It follows, on the authority of this case, so the Official Assignee contends, that the execution creditors cannot retain the moneys they received from the Sheriff in this case.

Counsel for the execution creditors did not directly refute this reasoning but submitted that

the principle laid down in *Ex parte Villars*[2] was preferable and should be applied to the present case. The case of *Exparte Villars, supra,* was decided before *Figg v. Moore, supra,* at a time when the law of bankruptcy provided that a seizure of a debtor's goods must be followed by a sale of the goods before the act of bankruptcy was complete. The goods seized by the sheriff in that case were sold to the execution creditor who paid for them by cheque. The sheriff kept the cheque for fourteen days as required by statute and then handed it back to the execution creditor. Shortly afterwards a bankruptcy petition was presented by another creditor, the act of bankruptcy which was alleged being the seizure and sale by the execution creditor. The question for decision was whether the execution creditor was entitled to retain the money paid to him by the sheriff and it was held that he could do so. It was pointed out by James L.J. that the bankruptcy of the debtor had relation back to, and commenced at the time of the act of bankruptcy "being completed", and as the act of bankruptcy was not completed until the sale was completed, the bankruptcy did not commence until after the sale, that is, after the payment by the Sheriff to the execution creditor. "If the act of bankruptcy is the act of the bankrupt himself," Lord Justice James explained, "then the title of the trustee relates back to the moment of the commencement of the act done by him; but if, as in the present case, it is not a voluntary act of the bankrupt, but a proceeding *in invitum*, it relates back only to the moment after the completion of the transaction which constitutes the act of bankruptcy". That case was decided when the law was that an act of bankruptcy was not complete until the goods were sold and therefore it has no applicability to a case where the law provides that an act of bankruptcy is complete if the Sheriff holds the goods for twenty-one days, as was the position when *Figg v. Moore* was decided, or where the law provides that the seizure alone constitutes an act of bankruptcy, as is the case in Singapore.

It is interesting to note that in the case of the Trustee of *John Burns-Burns v. Brown*[3] the facts of which were very similar to the facts of *Figg v. Moore, supra,* counsel for the execution creditors advanced almost exactly the same argument as counsel for the execution creditors in the present case. He submitted that the decision in *Figg v. Moore, supra,* was erroneous and invited the Court to apply the principle of *Ex parte Villars, supra.* The Court of Appeal held, however, that *Figg v. Moore* was rightly decided and that *Ex parte Villars* did not apply, Lord Halsbury commenting that the point seemed to him too clear for argument. In my opinion the principle of that case and of *Figg v. Moore, supra,* covers the present case. The argument of the Official Assignee, in my view, is unanswerable. There will be judgment for the Official Assignee in the terms of his motion.

Judgment for the Official Assignee.

Solicitors: *Allen & Gledhill.*

VEB FILMFABRIK AGFA WOLFEN v. AGFA AKTIENGESEL SCHAFT FUR PHOTOFABRIKATION

[O.C.J. (Chua J.) December 13, 1957]

[Singapore — Originating Motion No. 8 of 1957]

Trade Mark — Application for registration made but before registration completed war commenced — Vesting order — Custodian of Enemy Property.

In this case the respondents, Agfa Aktiengesel Schaft Fur Photofabrikation, applied for the registration of a mark which consisted of the word "Agfa". Before the mark could proceed to registration there was another application for the registration of a similar mark by the appellants, Veb Filmfabrik Agfa Wolfen. By agreement between the parties, the appellant withdrew their application and lodged opposition against the respondents' application. After hearing the parties the Registrar decided that respondents' application should proceed.

The evidence of the appellant before the Registrar consisted of two statutory declarations by a director of the appellant firm and the respondents' evidence consisted of eight statutory declarations by various persons, who were formerly connected with the respondent firm. The Registrar's decision was to the effect that the respondents were the successors in title to the Agfa mark in Singapore and that the appellants have not satisfied her that they have any merits or rights whatever in the Agfa mark in Singapore. It is against this decision that this appeal was lodged.

Held: confirming the Registrar's decision, that the word "Agfa" is the initials of Anilin & Co. who were the original owners of the mark and the factory at Wolfen has "Agfa" as part of its name only when the factory was under Soviet control, and the appellants used the word "Agfa" as part of their name when they were formed in 1954. The appellants have no title to the word "Agfa" and that word is adopted by the appellants in order to trade on the goodwill which has been built up by Anilin & Co. and I. G. Farben.

Appeal dismissed.